

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION I

CA 06-1024

April 25, 2007

MICHAEL E. BROWN

APPELLANT

AN APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F411324]

V.

WINFIELD CABINET SHOP AND
COMMERCE & INDUSTRY
INSURANCE COMPANY

AFFIRMED

APPELLEES

SARAH J. HEFFLEY, JUDGE

Appellant Michael Brown appeals the decision of the Arkansas Workers' Compensation Commission finding that the injury to his left knee did not occur while he was at work. On appeal, appellant does not contend that the evidence is insufficient to support that decision. His argument is that the Commission erred by allowing appellees to withdraw the stipulation that he had sustained a compensable injury and in concluding that he waived any objection to their retraction of the stipulation by failing to raise a timely objection. We find no error and affirm.

Appellant began working for appellee Winfield Cabinet Shop in April of 2004. He alleged that he sustained a work-related injury to his left knee on August 24, 2004. Appellees accepted the claim as compensable and paid for appellant's medical treatment, including surgery, as well as temporary-total disability benefits and permanent-partial impairment benefits of seven percent to

the lower extremity.

Appellant filed the present claim seeking additional medical treatment. According to the prehearing order filed on June 30, 2005, the parties stipulated that appellant had sustained a compensable left-knee injury on August 24, 2004. Appellees opposed appellant's claim for additional medical benefits on grounds that he had reached maximum medical improvement and had been returned to work at full duty, and that any need for medical care was the result of a preexisting congenital condition or an independent intervening cause.

The hearing was convened on August 31, 2005. At the outset of the hearing, the administrative law judge (ALJ) recited the parties' stipulations and asked if there were any other stipulations to be made. The following colloquy then ensued between the ALJ and appellees' attorney:

APPELLEES' COUNSEL: Your honor, the Respondents can stipulate to an average weekly wage of \$400, with respective indemnity rates of \$267 and \$200, for TTD and PPD. We can also stipulate the Claimant was assigned a seven percent lower left extremity impairment rating, which was accepted and paid by the Respondent carrier. And, Your Honor, I mean, as far as the stipulations here today, I think that it is clear and I related in the prehearing conference that the Respondents had, in fact, accepted this injury; however, one of our contentions today is that the Claimant's need for medical treatment is associated with preexisting problems. It is the employer's position that, even though the carrier accepted the claim, they have questioned the claim, and are going to testify today that, in fact, the severity of the injury itself didn't warrant the medical treatment that has been afforded to Mr. Brown. And while we are not asking that any money be repaid, we are saying that any additional medical treatment should not be the responsibility of the Respondent carrier.

ALJ: You are kind of jumping ahead of me a little bit, but as far as stipulations?

APPELLEES' COUNSEL: I'm sorry I did that, but when you said that we had stipulated to a compensable injury, that is, in fact the case; however, as the testimony will develop today, that is kind of

why I did it then. My folks are here today to say the injury -- they are essentially going to say the injury didn't happen; and therefore, his need for continued medical care is nonexistent.

ALJ: Well, that changes it from what you said at the prehearing, and it changes what you said a moment ago.

APPELLEES' COUNSEL: Well, no. We have accepted the claim and they have paid it.

ALJ: Well, if he is going to have to prove that his claim is compensable, he is also going to be looking at some more attorney's fees. It is a different problem if this is a compensability issue and his attorney's fee request is going to be different, too.

APPELLEES' COUNSEL: And it's not a compensability issue, Your Honor. What my folks are going to say is that, in light of the fact that they don't believe there was any injury that occurred, his need for additional medical treatment at this point in time ...

ALJ: That sounds like compensability to me. I can't -- that is slicing it too thin. Now, what you said at the prehearing was that he had been released to return to full-duty work; he had reached maximum medical improvement; and that any need for medical care was the result of preexisting congenital conditions, not the Claimant's compensable injury; also, that any physical problems might be the result of an independent intervening cause.

APPELLEES' COUNSEL: And that is, in fact, the case.

ALJ: Okay. But you are now saying that they say he didn't have a compensable injury, that you accepted it as compensable, but it really wasn't compensable.

APPELLEES' COUNSEL: Well, my folks are going to say the incident, if anything that occurred, didn't cause the problems the Claimant had. And that, therefore, his need for continued medical care is supported by Dr. Luter's position that this is a congenital problem and not associated with any traumatic incident.

ALJ: Well, you know, if he is -- I mean, it is going to change the nature of the hearing if he is going to have to litigate whether or not he had an injury to begin with, even though it was accepted technically and things were paid. If it is controverted now, it is controverted. And if he is going to have to prove that he had a compensable injury, then that's a different -- it makes his burden a

little different today, even though we want to pretend like it's – you know, it's kind of like the emperor's new clothes here, we are going to pretend like it is something it isn't. Well, it sounds like he is going to have to prove that he had a compensable injury, not that a compensable injury which was already accepted is causing this problem. But if we are going to argue about the incident and what happened to him to begin with and all that, that sounds like compensability to me.

APPELLEES' COUNSEL: Your Honor, the Respondents have accepted compensability, and they did pay benefits associated with the claim.

The ALJ and both counsel then went on to discuss the nature of the medical treatment appellant was seeking. At the conclusion of these preliminary matters, appellant's counsel reserved the right to call appellant's wife as a witness, and appellant's counsel also stated:

Your Honor, if I may add one thing on there, if we get to the point, and I don't know if we will or not, that would, of course, be for you to decide, but if we get to the point that compensability is an issue, we would ask for an award of attorney's fees commensurate with that.

Appellant was called as the first witness. He testified that he hurt his left knee on August 24, 2004, while installing cabinets at the First Baptist Church in Benton. Appellant said that he and Harold Tipton were carrying a 400-pound cabinet and that he stumbled when his right foot got caught on some carpeting. He testified that he used his left leg to balance himself and that he felt his left knee tear and heard it pop. Appellant claimed that Tipton asked if he had been hurt, and he testified that he told Roger Winfield what had happened the day of the accident. Appellant said that he was limping after the accident but that he first sought medical treatment on September 6, 2004, at an emergency room where he was given a brace to wear on his knee. Appellant testified that he worked privately at the church installing paneling over the Labor Day weekend. He continued to work his regular duties until his surgery on October 18. He was returned to work on November 16 but was laid off a couple of weeks later. After being laid off, appellant was not able

to collect unemployment benefits because he had fraudulently obtained unemployment compensation in 1996. Appellant had since worked at SkillSpan and R&N Hydraulics. He was currently employed as a maintenance man at the Autumn Park Apartments.

With regard to the need for further medical treatment, appellant testified that his left knee continued to grind and pop and that his left leg was now bowed. He said that he had pain in both legs and his back because of the way he has to walk. He said that he experienced sharp pain with every step he takes and that it swells with activity. Appellant rested his case at the conclusion of his testimony.

Appellees presented the testimony of Roger Winfield, who owned the business with his father. Winfield testified that they installed cabinets at the Baptist Church on August 13 and 16 of 2004 but that no cabinets were installed there on August 24. He said the first time he was made aware of appellant's alleged injury was on September 7, 2004, when appellant came to work wearing a knee brace and told him that he had hurt his knee while working at the church. Prior to that time, Winfield had not noticed that appellant was having any physical difficulties with his left knee, and he said that appellant had not complained of any problem associated with his knee. Winfield testified that they had worked three jobs between the one at the church and September 7 and that appellant did not have any problems performing his work. He said that the large cabinets appellant had described were not physically carried inside, but rather they were loaded onto a cart and pushed.

Harold Tipton, appellant's co-worker, remembered installing cabinets at the Baptist Church with appellant, but he did not recall an incident where appellant tripped and hurt his knee. He testified that after this job appellant worked normally and that his duties were not modified because of any knee injury. He also testified that the heavier cabinets were not carried by hand but were loaded onto a cart.

Prior to his cross-examination of Mr. Tipton, appellant's counsel objected to the testimony appellees had offered raising the issue of whether appellant had hurt his knee at work. Counsel argued that the testimony was improper because appellees had stipulated that appellant sustained a compensable injury, and that the testimony was not relevant to the issues of an alleged preexisting condition or intervening cause. The ALJ overruled appellant's objection, ruling that appellant had waived any objection he might have had during the preliminary discussions when he asked for an attorney's fee should compensability become an issue.

Appellees concluded their case with the testimony of Randy Neal. Neal was also employed by appellee and testified that they worked at the Baptist Church on August 13. He did not remember appellant tripping over carpet and injuring his knee while they were working at that job. He said that appellant was not limping and did not favor his knee after that project and that appellant had no problems working any of the subsequent jobs. Neal testified that the Friday before the Labor Day weekend appellant told him that he was going to install paneling at the church on his own over the holiday and that appellant returned to work injured the following week.

Appellant called his wife, Georgia, as a rebuttal witness. She testified that appellant came home late from work toward the end of August, that he was limping, and that he said he had tripped while carrying a cabinet at a church. She assumed that he told his boss about the incident because they had discussed the need to do so.

In his written opinion, the ALJ noted his ruling that appellant's objection to the withdrawal of the stipulation on compensability came too late, and he ruled that the greater weight of credible evidence showed that appellant did not injure his left knee at work. Accordingly, he denied appellant's claim for additional medical treatment. The Commission affirmed and adopted the ALJ's decision. This appeal followed.

Appellant argues that his objection to the testimony bearing on the issue of compensability should not be considered untimely. He contends that an objection was not necessary and no waiver occurred because appellees maintained that they were not contesting compensability. Arkansas Code Annotated section 11-9-705(a)(1) (Repl. 2002) provides: “In making an investigation or inquiry or conducting a hearing, the Workers’ Compensation Commission shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure ... but may make such investigation or inquiry, or conduct the hearing, in a manner as will best ascertain the rights of the parties.” Though the rules of evidence and procedure are relaxed, the Commission is expected to adhere to basic rules of fair play, such as recognizing the right of cross examination and the necessity of having all the evidence in the record. *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Brewer v. Tyson Foods, Inc.*, 10 Ark. App. 88, 661 S.W.2d 423 (1983). We need not decide whether the Commission erred in ruling that appellant waived his right to object because it is our conclusion that the Commission did not abuse its discretion in allowing appellee to withdraw the stipulation.

A stipulation is an agreement between attorneys respecting the conduct of the legal proceedings. *Dinwiddie v. Syler*, 230 Ark. 405, 323 S.W.2d 548 (1959). Although appellant argues that a stipulation is irrevocable and binding, the Commission has the discretion to allow a party to withdraw a stipulation. In *Jackson v. Circle T Express*, 49 Ark. App. 94, 896 S.W.2d 602 (1995), the employer accepted compensability and paid benefits, and it stipulated to compensability for purposes of a hearing to determine wage-loss benefits and related medical expenses. The stipulation also was memorialized in a prehearing order, as in the present case. Nevertheless, the Commission allowed the employer to withdraw the stipulation as to compensability in defense of the claim for additional benefits. The Commission reasoned that enforcing the stipulation was not compatible with the basic

notions of justice and fair play. We affirmed the Commission's action, holding that its decision was consistent with its statutory duty under Ark. Code Ann. § 11-9-705(a)(1) to conduct the hearing in a manner that would best ascertain the rights of the parties. We also concluded that the appellant had suffered no prejudice as a result of the Commission's decision to allow the employer to retract the stipulation.

Here, appellant does not allege prejudice, nor do we perceive any. From our review of the record, appellant ably cross-examined appellees' witnesses, and his wife was present and at the ready to offer testimony in rebuttal of appellees' witnesses. Appellant did not request a continuance nor make any claim that he was not prepared to counter appellees' defense. In the absence of any allegation or showing of resulting prejudice, we hold that the Commission did not abuse its discretion by allowing appellee to withdraw the stipulation.

Affirmed.

ROBBINS and GLOVER, JJ., agree.